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# Reflection on the Present Footing of Judicial Administration

BY THOMAS C. CLARK\*

## PROCEDURE IS VITAL TO EFFECTIVE JUSTICE

Over a quarter century ago my Brother Frankfurter said in his concurring opinion in *Malinski v. New York*: "This history of American freedom is, in no small measure, the history of procedure."<sup>1</sup> And only last year Chief Justice Burger suggested that the problems were so "colossal and immediate" that priorities must be assigned. His first priority was "to methods and machinery, to procedure and techniques, to management and administration of judicial resources even over the much needed reexamination of substantive legal institutions that are out of date."<sup>2</sup> After fifty years in the Law, I would say that procedure is the most important because it gives life to the Law. What good is a law if it be a corpse? Obviously the rule of law must be first determined before it can be applied; but in fact, problems of enforcement are considered before the rule of decision is finally formulated. If not, the substantive rule becomes bogged down in implementation and is discarded. We need only refer to the "noble experiment"<sup>3</sup> in prohibition and our present predicament in the enforcement of marijuana, prostitution and drunkenness statutes.

Indeed, Chief Justice Hughes taught us many years ago that any principle of law—whether constitutional or statutory—was but a piece of parchment until implemented and enforced. The proposal of the Kentucky Law Journal that a symposium on Judicial Administration and Law Reform be prepared gave me

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<sup>1</sup> 324 U.S. 401, 414 (1945).

<sup>2</sup> Address, National Conference on the Judiciary, 54 JUDICATURE 410, 411 (1971).

<sup>3</sup> For an interesting discussion of our latter-day "noble experiments" with alcohol and drunkenness, see R. NIMMER, TWO MILLION UNNECESSARY ARRESTS (1944).

renewed hope that the law reviews would take up the cudgels of court modernization. Not that I was enthused over its title which linked the word *reform* with that of *law*, with resulting connotations of criminality. However, the list of distinguished contributors gave me complete assurance that the Journal was on the right track. I am honored to be included among the contributors.

#### UNENFORCEABLE AND HARASSING LAWS: THE ENEMIES OF JUSTICE

Many years ago Mr. Justice Brandeis observed that "unenforceable or harassing laws tend to make criminals."<sup>4</sup> History confirms this conclusion. Indeed we are making thousands of criminals out of otherwise law-abiding people through the enforcement of the possession prohibition of the marijuana drug laws.<sup>5</sup> Perhaps one reason for this is because so many people do not believe in these laws and are frequent violators. It is estimated that 20 million people smoke pot. There is an adage that to forbid Americans "anything is to make us have a mind for it."<sup>6</sup> In a like manner, other laws are observed in the breach, i.e. prostitution, gambling, drunkenness. These consensual, victimless crimes place the law in general disrepute. The roster of index crime indicates charges involving drunkenness alone run into the millions each year. Still liquor flows freely and public drunkenness is not uncommon. The truth is that Americans have a habit of demanding the passage of prohibitory laws every time some sporadic event disturbs their calm. As a consequence, volume upon volume of new or amended laws are added to our statutes at each legislative session. In the battle for new and amended laws, those suffering discontent seek comfort, those who are afraid crave courage, those who are sad seek happiness and the public foots the bill. In the end, all of us suffer disappointment.

#### THE LIFE OF LAW IS ITS IMPLEMENTATION

Little thought is given to the fact that every law must be implemented. To be effective, the court system must not only

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<sup>4</sup> A. MASON, *BRANDEIS, A FREE MAN'S LIFE* 90 (1946).

<sup>5</sup> 21 U.S.C. §§ 844 *et seq.* (1970).

<sup>6</sup> M. MONTAIGNE, *ESSAYS* II at 1580.

have a sufficient number of judges, but the staff and supporting services must be both adequate and efficient. This includes not only the clerical assistance but the prosecutors, defenders, custodial services, probation officers, correction officials and parole boards on the criminal side and the practicing Bar on the civil side. For instance, it serves no purpose to have a judge available to hear a criminal case unless there are sufficient custodial officers to produce the defendant and guard him during the trial, sufficient prosecutors and defenders to prepare the case and try it, sufficient probation officers to handle those defendants who are convicted but are probated or later paroled, and sufficient facilities to service those found guilty and sentenced to prison. In addition, parole boards must be adequately staffed to perform that function. Fiscal authorities do not appear to understand this *sine qua non*. For example, local governmental units in New York's First Department (Manhattan) have failed to furnish the additional supporting staffs needed to handle the increased number of case dispositions resulting from the additional time now devoted to trial—longer daily hours as well as night and Saturday sessions of court. This has completely stymied the proposed crash program of the court system requiring a criminal prosecution to be tried within a period not exceeding six months from the date of arrest. Likewise the national effort to reduce the incidence of crime has been focused on the constabulary. The billion dollars expended last year for this purpose went to state and municipal police systems with only a dribble to the courts and its supporting staffs. The result was that the increase in criminal case filings swamped the court system, the facilities of which had not been increased. Obviously this disparate treatment must be corrected if the program is to succeed. The court cannot proceed to trial unless the defendant is brought to court by his custodians; unless the prosecutive and defense staffs are of sufficient size to prepare the case and be ready for trial; unless the correction authorities have sufficient staff and facilities to receive the prisoner on sentence; and unless the parole and probation service is able to process those who are not sentenced to prison or who are paroled therefrom. When the entire system is not geared to meet the increased case load, it bogs down when the input of cases increases, as it must, when the size of the constabulary is enlarged.

## THE COURTS AND THEIR PROCEDURES MUST BE MODERNIZED

Moreover, the court structure needs modernizing in most of our states. At present it has little or no central control. If the system were unified with control over it placed in the Chief Justice or the highest court of the state, it would be much more efficient. The selection of judges should be removed from politics, their tenure enlarged, and in most states, their compensation increased. Reliable and swift procedures for the discipline and removal of judges should also be provided. The court system would then attract a higher caliber of judicial officers. The clerical staffs of courts must also be removed from politics and their selection placed in the hands of expert administrators appointed by the Chief Justice or the highest court of the state.

The rules of practice and procedure of the courts must be revised and improved. Continuing education for judges and their staffs must be conducted to the end that the most efficient techniques of trial possible be fashioned. For instance, the American Bar Association, after five years of study, adopted specific standards of criminal justice in 1968. Although it directed its Criminal Law Section to implement the Standards through adoption in the states, not a single state has done so. As Chairman of the Committee selected to perform the task by the Criminal Law Section, I must admit that we have made little actual progress. The reason is that the Committee is underfunded and understaffed. Although months ago we sought funds for central staffing, none has been forthcoming, except through the usual fiscal sources of the Section, which are entirely insufficient. These Standards, I submit, are a complete answer to the crime wave, but they lay on the shelf printed in separate pamphlets awaiting implementation. While they have received wide circulation, have been the object of study by many seminars of state and regional coverage and one national conference and are individually cited often by the courts, both at trial and on the appellate level, they are not yet followed in practice. Indeed, less than ten states have been able to finish a comparative study of their present law with the provisions of the Standards because of a lack of funds. Naturally, such a study is necessary before local action can be taken. These Standards when adopted and followed, would streamline the processes of criminal justice, eliminate present delays, reduce the

present interminable postconviction proceedings and eliminate many of the existing injustices in our criminal justice system. They could be implemented within a year or so if we had the estimated \$500,000 required to do it. This would be 1/2000 of the billion dollars which congress has appropriated for criminal law enforcement this year, and 1/2 of that (1/4000) of the projected figure for fiscal 1973.

#### TREMENDOUS PROGRESS HAS BEEN MADE OF LATE

This is not to say that judicial modernization and effective revision is not on the march. Indeed, it has come to "a double time" of late through the efforts of Chief Justice Burger who is our foremost catalyst for a more effective system of justice. He has sponsored, and there have been organized during the short period that he has been the Chief Justice of the United States, at least a half dozen national programs in judicial administration. These include a national academy for the training of court administrators; a criminal sentencing and corrections project; a study of law school instruction on the practicability of using student clinics in courts and administrative agencies; the creation of a national center for state courts; a study of the rising case load of the United States Supreme Court with a view to modernizing case control, expedition and management; and the organization of state-federal-judicial councils composed of both state and federal judges to resolve related problems. Practically every state has organized such a council on request of the Chief Justice.

Prior to the Chief Justice's appointment, the Congress had created the Federal Judicial Center, which conducts schools, seminars and exercises for federal judges and their staffs. It has been of great assistance to the federal judiciary and has also organized some joint projects with the state judiciary. The National Center for State Courts is a counterpart in the state system. The National College of the State Judiciary was organized some five years ago as an outgrowth of the Joint Committee for Effective Justice, which was organized by the A.B.A. It conducts a school for state judges, both of general and special jurisdiction, as well as seminars on judicial administration at the state and regional level. The North American Judges Association has an Academy

for judges of limited jurisdiction which conducts classes each summer and holds educational meetings during the year.

The Institute for Judicial Administration has annually conducted a school for appellate judges for almost a score of years. It also makes surveys of court systems, recommends and supervises the adoption of improvements and maintains the most complete judicial administration library in the country.

The American Judicature Society has rendered yeoman service in the field of modernizing the state court structure, promoting programs on the appointment, tenure, compensation, discipline and removal of judges and organizing and conducting a national conference of state judicial disciplinary commissions. It has also published for over a half century a prestigious magazine, *JUDICATURE*, which is a recognized leader in its field.

The Council on Crime and Delinquency has been pioneer in corrections and its Council of Judges has become most influential in the field. It conducts inquiries and research in this and related areas and publishes reports that have received national recognition.

The National Conference of Juvenile Judges has been busy in its area and has done excellent work in improving juvenile justice. It has, through seminars, conducted continuing education courses for its members and has been successful in elevating the standards of qualification for juvenile judges. This is a most important field and since *In re Gault*<sup>7</sup> has taken on new significance.

### SUMMING UP

For the sake of brevity, I have omitted some areas. For instance, a large percentage of the injustices of justice lie in the area of courts of the first instance such as small claims, misdemeanors, traffic control, landlord and tenant, summary seizures [statutory replevin, inkeepers' lien, landlord's levy, repossessions etc.]<sup>8</sup> We certainly need to give more attention to these problems, for the image of justice is bespattered by this neglect and at a level where it receives its largest blotch. However, just as big

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<sup>7</sup> 387 U.S. 1 (1967).

<sup>8</sup> For an interesting and instructive article on this subject see Brown, *A Meaningful Opportunity To Be Heard*, 46 ST. JOHN L. REV. 25 (1971).

oaks from little acorns grow, the projects that I have mentioned will soon encompass these dark areas and render assistance to them. It was Archimedes who said: "Give me a place to stand and I can move the earth." The judiciary is finally gaining a foothold that will result in the whole system being in on the march to modernization.

Our errors always float upon the surface and are subject to ready criticism but the basic faults in the judicial system seldom surface. We shall have to continue to dive below if we hope to recover the real pearls. Our chief problem is that people wrangle over the court system, blame it for the crime wave, curse those of us who sit upon the bench, fight against becoming involved in its improvement and gripe about no one doing anything about it. We need to change this attitude, especially on "becoming involved." We need to get every person involved because the courts are the last bulwark of individual freedom. We must strengthen its foundations.

My father used to say that the road to hell was paved with good intentions; that it was one of gradual downward slope, soft underfooting and without sudden turns, milestones or signposts. It may be that the courts were on that road, as some people say. But I tell you that situation is no more, for sure!

Just as Daniel Webster said that justice was the great interest of man on earth, the way to secure justice is through a good court system supported by all men. The American people are entitled to no less and they should have more. If all of us, regardless of our present place in life, are sufficiently determined, we can attain that goal—Are you ready? If so, as Mr. Justice Holmes cried out. "We will not falter, we will not fail. We will reach the earth-works if we live, and if we fail we will leave our spirit in those who follow, and they will not turn back. All is ready. Bugler, blow the charge."